87 - 1330 (1)

NUMBER _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

ROBERT POTTER, CHRISTOPHER HOWARD, and MARY KAY LINDSTROTH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

Petitioners, ROBERT POTTER, CHRISTOPHER HOWARD, and MARY KAY LINDSTROTH, respectfully request that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

QUESTIONS PRESENTED

I.

Where an affiant acts with inexcusable negligence by including in his affidavit false and misleading information, may the government rely on the good-faith exception of *United States v. Leon*, 468 U.S. 897 (1984), to avoid suppression of seized evidence?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption to this petition.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals affirming the district court's denial of petitioners' suppression motions is attached (Appendix 1). This published opinion (amended December 18, 1987) in Case Nos. 86-1325, 86-1333, and 86-1334 will appear at 830 F.2d 1049. A petition for rehearing was denied when the court amended its opinion (see Appendix I).

The district court decision consisted of oral findings and an oral order in Case CRS-86-052-LKK in the Eastern District of California.

JURISDICTION

The Court of Appeals had jurisdiction over this case pursuant to Title 28 U.S.C. sec. 1291. The judgment of the Court of Appeals was entered on October 21, 1987. A petition for rehearing was timely filed on or about November 4, 1987. On December 18, 1987, the Court of Appeals issued an Amended Opinion and denied the petition for rehearing (Appendix 1). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISION

The governing constitutional provision in this matter is the Warrant Clause of the Fourth Amendment to the Constitution of the United States which provides that:

> "...No Warrants shall issue, but on probable cause, supported by Oath or affirmation ..."

STATEMENT OF THE CASE

Petitioners were indicted in the United States District Court, Eastern District of California, and charged with violations of 21 U.S.C., section 841(a)(1) (manufacturing of methamphetamine). The evidence against them consisted primarily of contraband and equipment which could be used in the manufacture of methamphetamine. It was found and seized pursuant to a search warrant authorizing the search of two locations: the residence (including the garage) of petitioners POTTER and LINDSTROTH and the residence of petitioner HOWARD. Petitioners moved in the District Court to suppress the evidence seized from the residence of POTTER and LINDSTROTH [1], contending that on its face, the affidavit in support of the search warrant did not contain a substantial basis for the finding of probable cause to search their residence (*Illinois v. Gates*, 462 U.S. 213 (1983)).

The single affidavit which was used to support the search warrants for both POTTER's and LINDSTROTH's residence, as well as HOWARD's residence. Its averments may be summarized as follows:

1. On February 7, 1986, narcotics agents observed an unidentified person unloading boxes containing chemicals and hardware which could be used to manufacture methamphetamine. This occurred at the Mayflower Moving Company in Sacramento. Shortly thereafter, CHRISTOPHER HOWARD and a second (unidentified) person met at the Mayflower Moving Company. The second (unidentified) person was then followed to 3401 Hilton, Shingle Springs. In his vehicle were boxes similar to those that were unloaded earlier at the moving company.

2. On February 20, 1986, CHRISTOPHER HOWARD was seen purchasing glassware, chemicals, and dry ice (all of which could

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[1] In the District Court, petitioner HOWARD also moved to suppress evidence seized from his house. His contention was abandoned following the decision of the District Court. Petitioners have further contended that (a) the affidavit contained false averments which were made in reckless disregard for the truth (*Franks v. Delaware*, 438 U.S. 154 (1978)) and (b) that some of the information included in the affidavit was obtained by unconstitutional police conduct in entering the curtilage of POTTER's residence. Neither of these contentions is raised here. At all times petitioners have conceded that the affidavit on its face contains sufficient information to support the issuance of the search warrant for HOWARD's residence.

be used to manufacture methamphetamine). He was then observed stopping at three different residences before driving to his own home at 3621 Loma Drive, Shingle Springs. This address is approximately one-half mile from the residence at 3401 Hilton.

3. Utility bills for HOWARD's residence at 3621 Loma Drive showed a power consumption several times higher than the average in the area for the period from January 24, 1986 to February 26, 1986; they also showed high power consumption for the preceding one-month period. High power consumption is consistent with the manufacturing of methamphetamine.

4. CHRISTOPHER HOWARD was a convicted felon who had suffered a conviction for possession of methamphetamine. In October 1985, CHRISTOPHER HOWARD had been arrested on numerous criminal charges including possession of methamphetamine for sale.

5. On February 21, 1986, CHRISTOPHER HOWARD was followed by narcotics agents. He drove from his Loma Drive residence to a business in El Dorado whose owners are suspected of manufacturing methamphetamine, and then he returned to his home. While at his house, he was seen carrying an ice chest from his residence to a location near an outbuilding on his property. Later he drove to a Runnymead address in the El Dorado area. From there, he drove to a Western Union office in Placerville where he purchased a money order for $2,100.00 made payable to a third party. He then returned to the Runnymead residence. At approximately 4:45 p.m., HOWARD drove from the Runnymead address to a residence at 8011 Joaquin Way (POTTER's and LINDSTROTH's residence). At approximately 6:00 p.m., HOWARD's paramour arrived at 8011 Joaquin Way. While HOWARD and his paramour were at the residence, surveilling agents heard construction noises in the barn located approximately 30 feet from the house. HOWARD and his paramour left the residence convoy style at approximately 9:10 p.m. Thereafter, HOWARD returned to 3621 Loma Drive.

6. The residence at 8011 Joaquin Way was leased by ROBERT POTTER, who had occupied the residence since February 1, 1986.

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[2] Following an evidentiary hearing, the trial court found that CHRISTOPHER HOWARD had not in fact suffered such conviction but that the inclusion of the false allegation in the search warrant affidavit was not done with reckless disregard for the truth nor with intentional falsity.

7. On February 25, 1986, two surveilling agents heard hammering and sawing noises coming from the barn at 8011 Joaquin Way. One of the two agents heard a male adult say, "get ahold of Chris to see how he wants it". The agents saw ROBERT POTTER and Danny Melohn [3] walk between the residence and the barn numerous times during the one hour and 35 minute surveillance.

8. ROBERT POTTER was a convicted felon with "numerous arrests for possession of methamphetamine for sale, possession dangerous weapons, possession of methamphetamine, and assault with a deadly weapon." [4]

9. On February 25, 1986, the affiant spoke with a Sacramento County Sheriff's detective. The detective had spoken with a confidential informant, who had provided truthful information in the past. The informant told the detective that he had been told by an unidentified individual that CHRISTOPHER HOWARD and ROBERT POTTER were "currently" (the time frame of the remarks was not specified) manufacturing methamphetamine and that Danny Melohn and Rick Goodwin "may also be involved". The unidentified individual also told the confidential informant that he (the unidentified individual) was selling methamphetamine for POTTER and HOWARD.

The District Court found it "remarkable" and "astonishing" that the Magistrate issued the warrant for POTTER's residence on these averments and (impliedly) concluded that as to POTTER's residence, the affidavit did not contain a substantial basis for finding probable cause. Following an evidentiary hearing, the District Court also found that the affiant had included false averments in the

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[3] Following an evidentiary hearing, the District Court found that not only were the agents incapable of making a reliable identification from their vantage point, but Danny Melohn was in fact not present at the property. While accepting the Government's position that the agent was merely mistaken, the court found that the agent had presented the evidence "in a false light" by his failure to reveal the dubious nature of his identification. However, the court declined to find that either the identification itself or the reliability of the identification process was made with a reckless disregard for the truth or with intentional falsity.

[4] Following the evidentiary hearing, the District Court found that the 50-year-old POTTER had never been convicted of a felony. Again, however, the District Court also concluded that the affiant had not included that false statement with reckless disregard for the truth or with intentional falsity.

affidavit and had presented other information in the affidavit in a "false light." The District Court further found that the inclusion of the false information was "careless", "disrespectful of the warrant process", and entailed "errors which experienced officers ought not to make." However, the District Court concluded that the false information was not included with reckless disregard for the truth or with the intent to deceive. For this reason, the District Court held that the good-faith exception of *United States v. Leon, supra,* necessarily precluded suppression of the evidence and thus denied petitioners' motion.

The Court of Appeals rejected the District Court's determination under *Illinois v. Gates, supra,* finding instead that the Magistrate did have a substantial basis for finding probable cause for the search of POTTER's residence and affirmed the denial of the suppression motion without reaching the question of the applicability of the good-faith exception of *United States v. Leon, supra.*

SUMMARY OF ARGUMENT

United States v. Leon, 468 U.S. 897 (1984), contains conflicting language with regard to the applicability of the good-faith exception to the exclusionary rule to cases where a law enforcement officer has included false statements in a search warrant affidavit through inexcusable negligence, but without reckless disregard for the truth or intent to deceive. It is petitioners' position that the good faith exception should not apply to cases where police conduct falls short of "complete good faith" and, hence, is conduct of the sort which can and should be deterred.

ARGUMENT

CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE GOOD-FAITH EXCEPTION TO THE EXCLUSIONARY RULE OF *UNITED STATES V. LEON*, 468 U. S. 897 (1984), APPLIES WHERE AN AFFIANT HAS, THROUGH INEXCUSABLE NEGLIGENCE, INCLUDED NUMEROUS FALSE STATEMENTS IN A SEARCH WARRANT AFFIDAVIT.

Since its decision in *United States v. Leon*, 468 U. S. 897 (1984), this Court has neither discussed nor clarified the scope of the good-faith exception to the exclusionary rule which was set forth in that case. Correctly analyzed, the facts of this case raise the undecided question of whether the good-faith exception applies where the affidavit includes numerous false statements made negligently and with disrespect for the warrant process, but not with such disregard for the truth as to be considered reckless or intentional. The issue turns upon the resolution of conflicting pronouncements in the *Leon* decision.

On the one hand, *Leon* sets forth a standard of "complete good faith" (*Id.* at 919, quoting from *Michigan v. Tucker*, 417 U.S. 433, 447 (1974) as reiterated *in United States v. Peltier*, 422 U.S. 531, 539 (1975)). That standard is repeatedly described as *"objective"* in nature (*Id.* at 908, 919- 20, 922 n 23, 923-24) and it appears to reflect the central rationale of the good-faith exception, that the exclusionary rule should apply only where the *police* behavior needs to be altered or deterred (*Leon, supra* at 918).

On the other hand, there is language in *Leon* that makes the exception inapplicable when, *inter alia*, the affiant has included false statements which reflect a reckless disregard for the truth or intentional deception in violation of *Franks v. Delaware*, 438 U.S. 154 (1978), *Leon, supra* at p. 923. The "reckless disregard for the truth" standard allows exclusion only for the most extreme form of misconduct. Moreover, the assessment of the level of misconduct as being negligent, or reckless, or intentional entails an evaluation of the mental state of the affiant; it is a *subjective* determination by nature. Bright-line adherence to the "reckless disregard for the truth" stan-

dard precludes application of the exclusionary rule to gross police negligence, even though such negligence can and should be deterred.

Clearly, there is a vast gap between complete objective good faith and reckless disregard for the truth. In a case such as this, the officer was not in complete good faith as shown by the objective facts; yet, neither did his subjective mental state amount to reckless disregard for the truth.

In this case, the affiant, while in possession of the criminal history records of POTTER and HOWARD, used false statements concerning those records to enhance the case for a finding of probable cause. He mistakenly averred that he had seen Danny Melohn at POTTER's residence and he mislead the Magistrate concerning the level of certainty of his identification. As the District Court found, the affiant's conduct was disrespectful to the warrant process, careless, and inexcusable. In short, it was deterrable conduct, but it was not conduct that amounted to a reckless disregard for the truth (*Leon, supra* at 919). Thus, viewing the affidavit on its face, and recognizing that it contained no substantial basis for finding probable cause as to POTTER's and LINDSTROTH's residence [5], the facts of this case fall squarely within the unresolved ambiguity of the *Leon* decision.

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[5] As noted, the District Court found that the affidavit was insufficient on its face under the standards of *Illinois v. Gates, supra;* indeed, the court found it "remarkable" and "astonishing" that a Magistrate would issue the warrant for POTTER's residence on such averments. The Court of Appeals, however, found that there was a substantial basis for the probable-cause finding. The flaws in the Court of Appeals' decision are easily seen.

In effect, the Court of Appeals reasoned that the corroboration of the double hearsay from an anonymous informant *with regard to HOWARD's illicit activities* that occurred independently of any activity which related to POTTER was the equivalent of corroborating the double hearsay *with regard to POTTER* (Slip Op., p. 7). The sole corroborating information concerning POTTER was that (1) HOWARD had met his paramour at POTTER's residence and stayed there approximately three hours; (2) there were hammering and sawing noises in the barn near POTTER's house and someone was heard to say, "get ahold of Chris to see how he wants it"; (3) POTTER had been arrested for possession of methamphetamine for sale at some unspecified time in the past, and (4) Danny Melohn had been seen at POTTER's house.

These facts fall far short of endowing believability to the double-hearsay information concerning POTTER. Clearly, they do not provide a picture which meshes in detail with the anonymously supplied information, nor do they suggest illicit activity on the part of POTTER. The Court of Appeals' contrary evaluation of these facts is mistaken.

First, the Court of Appeals' reliance on an inference that a methamphetamine laboratory was being built by reason of the hammering and sawing noises is unfounded. Nothing in this record (or elsewhere) suggests that a methamphetamine laboratory is constructed by hammering and sawing or that the hammering and sawing here were indicative of anything other than innocent activity (Slip. Op. p. 7). As set forth in the warrant itself, items associated with methamphetamine manufacturing include "apparatus consisting in part of and including, but not limited to, glassware, hoses, clamps, tubes, vacuum pumps, and vacuum flasks ...." Obviously, such items are not susceptible to either hammering or sawing. The logic of the Court of Appeals on this issue is akin to concluding that the purchase of a wrist watch, for example, is indicative of methamphetamine manufacturing because there is a need to time chemical reactions during the process. Wholly innocent activity is construed to be illicit, and then is used to support the conclusion that illicit activity is taking place. (Indeed, using the logic of the Court of Appeals, virtually *anything* POTTER was seen to do could have been construed to be related to the process of methamphetamine manufacturing.)

Second, observations of HOWARD's presence at POTTER's house did not entail any activity by HOWARD, save meeting with his paramour; indeed, HOWARD and his paramour were at the residence while the hammering and sawing occurred in the barn. Moreover, HOWARD was seen to be present at five other residences and two businesses. Among these was a business which was owned by suspected methamphetamine manufacturers and a residence belonging to a person on probation for the possession of methamphetamine.

Finally, the affidavit established unequivocal probable cause that the manufacturing was occurring at *HOWARD's* house. Power consumption for the period ending February 26, 1987—one day prior to the issuance of the search warrants—was extremely high; HOWARD transported dry ice—a deteriorating item used in methamphetamine manufacturing—to his residence; and HOWARD had transported chemicals and glassware to his residence earlier. The affidavit thus suggests that HOWARD was manufacturing at his own residence. The fact that POTTER was never seen at or near HOWARD's residence reasonably tends to disassociate POTTER from HOWARD's manufacturing enterprise. The Court of Appeals, however, surprisingly concluded that POTTER's *absence* at the known laboratory was affirmative evidence of his involvement, to wit: that the hammering and sawing noises were related to a replacement or extension of the known laboratory.

In short, the Court of Appeals' analysis did not employ a "common sense" reading of the affidavit; it began with the assumption that double hearsay was true,

and then twisted wholly innocuous facts to find support for that assumption. The District Court was completely correct in finding that the affidavit fell short of the standards of *Illinois v. Gates, supra*; the Court of Appeals' decision is mistaken in its contrary conclusion.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

DATED: January 21, 1988.

JOHN R. DUREE, JR.
Attorney for ROBERT POTTER

CHARLES W. BLAKELEY III
Attorney for CHRISTOPHER HOWARD

LARRY BARLLY, Attorney for
MARY KAY LINDSTROTH

APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT POTTER, CHRISTOPHER HOWARD, and MARY KAY LINDSTROTH, *Defendants-Appellants.*	Nos. 86-1325; 86-1333, 86-1334 D.C. No. CR-S-86-52-LKK ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
October 7, 1987—San Francisco, California

Filed October 21, 1987
Amended December 18, 1987

Before: J. Blaine Anderson, Robert Boochever and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Search and Seizure

Appeal from conviction. Affirmed.

Agent Till of the Bureau of Narcotics Enforcement (BNE) filed an affidavit as the basis for seeking two search warrants. Till has an extensive record in police work involving narcotics. Appellant Howard was observed purchasing and picking up materials that could be used to make methamphetamines. Howard drove to the Joaquin Way address where construction noises were heard. A reliable confidential informer revealed that Howard and appellant Potter were currently making drugs. Electrical power consumption at the Loma Drive was large, common with drug labs. Potter had numerous arrests for possession of methamphetamine for sale. On the basis of Till's affidavit, Magistrate Mix issued warrants to search the two addresses. Drugs and a drug laboratory were found at one address, drugs at the other address. Appellants moved to suppress the evidence, contending that the application for the warrants failed to establish probable cause and that several allegations in Till's affidavit were false. The district judge found they were careless errors and denied the motion to suppress.

[1] Magistrate Mix had probable cause to issue the warrant as to Loma Drive. [2] There was probable cause to believe that Howard was running a drug lab, there was reason to believe that he was collaborating with Potter, as the informant said; and there was reason to believe that the nocturnal activities at Joaquin Way of Potter and Howard were not innocent. [3] The district judge correctly found the errors were not intentional nor were they crucial. All the mistakes can be corrected and probable cause remains.

COUNSEL

John R. Duree, Jr., Inc., by John R. Duree, Jr.; Charles W. Blakeley III; and Larry Barlly, Federal Public Defenders, Sacramento, California, for the defendants-appellants.

Gloria C. Phares, Department of Justice, Washington, D.C., for the plaintiff-appellee.

ORDER

The opinion is amended as follows:

Slip Opinion Page 3, third paragraph, line 8, strike the words "under indictment" and substitute "arrested".

Slip Opinion Page 4, second paragraph, strike the sentence "A truck . . . February 7.".

Slip Opinion Page 6, Headnote [1], lines 7 -8, strike ", a man recently indicted for making the stuff,".

Slip Opinion Page 7, line 5, strike "are bought by" and substitute "involve".

Slip Opinion Page 7, line 6, strike "already under indictment for a drug offense and".

Slip Opinion, Page 8, line 1, strike "indictment" and substitute "arrest".

With these amendments, the petition for rehearing is denied.

OPINION

NOONAN, Circuit Judge:

Christopher Howard and Robert Potter conditionally pled guilty to manufacturing methamphetamine in violation of 21 U.S.C. § 841(a)(1); Mary Kay Lindstroth conditionally pled

guilty to possession of methamphetamine in violation of 21 U.S.C. § 841. All three defendants reserved their right to appeal the order of the district court denying their motion to suppress evidence against them. We affirm the district court.

FACTS

Stuart E. Till, an agent of the Bureau of Narcotics Enforcement (BNE) of the California Department of Justice, on February 26, 1986 filed an affidavit as the basis for seeking two search warrants. Till indicated that he had been in police work involving narcotics for 11 years, almost seven of them with the BNE; that he had attended a number of courses of study focused on the investigation of the manufacture and distribution of narcotics; that he had participated in the investigation of fifty drug laboratories; and that he had been involved in the dismantling of more than 25 secret methamphetamine laboratories. In connection with the warrants he sought Till had relied on information given him by BNE agents Matt Campoy and J.P. Johnston. The information set out in Till's affidavit was substantially as follows:

On February 7, 1986 the agents had observed a man buying items at Grau-Hall Scientific Co. in Sacramento—items determined to include thionyl chloride, acetone, vacuum pump oil, vacuum pump gas, and hardware, all materials that could be used in the manufacture of methamphetamine. Surveillance of the buyer led them to watch an apparent pick up of the materials involving Christopher Howard, a man already arrested in Sacramento County for possession of methamphetamine for sale. Two weeks later, on February 20, 1986, Howard was himself observed purchasing from Grau-Hall items which turned out to be a reaction flask, a Buchner funnel, a beaker, and other devices used to make methamphetamine. Howard then drove to an ice company where he bought dry ice, a substance also used in making methamphetamine. He went on to 3621 Loma Drive, a residence in an isolated rural area in Shingle Springs, California.

On February 21 Howard drove to 8011 Joaquin Way, a dirt road in Shingle Springs. While Howard was there he was in the company of his girl friend, Carrie Bockman. Between 8:30 and 9:00 in the evening while Howard and Bockman were there, an agent heard noises indicative of construction.

On February 25, 1986, during the evening, Till heard the noises of construction at 8011 Joaquin Way and observed two men on the premises, identified by him as Robert Potter and Danny Melohn. Another investigator overheard one of the men on the premises say, "Get a hold of Chris to see how he wants it." The men were moving back and forth from the house to a barn approximately 30 feet to the west of the house.

The Sacramento County Sheriff's Department informed Till that a confidential informer, who had in the past provided reliable information about narcotics, had informed the department that Christopher Howard and Robert Potter were currently making methamphetamine and that Danny Melohn might be associated with them; the informant's information came from someone who was selling for Howard and Potter. Till further learned from Pacific Gas and Electric Co. that the power consumption for the last two months at 3621 Loma Drive, Shingle Springs, had been between 4,000 and 5,400 kilowatts. Normal consumption would have been no more than 2,000 kilowatts. Till knew that methamphetamine labs consume a large amount of power.

Till stated that Potter had "numerous arrests for possession of methamphetamine for sale" and other crimes and that he was a convicted felon. He also stated Howard had been convicted of the possession of methamphetamine and of receiving stolen property.

On February 27, 1986, on the basis of Till's affidavit, Magistrate Esther Mix issued warrants to search 8011 Joaquin Way and 3621 Loma Drive for methamphetamine and vari-

ous named devices and chemicals used in its production and storage. At 8011 Joaquin Way the agents seized a methamphetamine laboratory, one and one-half pounds net weight of the drug, $10,000 in cash and over 47 guns and explosives. Potter and Lindstroth, who were present, were arrested. At 3621 Loma Drive the agents found a microwave oven containing one-half pound net weight of methamphetamine. Howard, who was there, was arrested.

PROCEEDINGS

The defendants moved to suppress the evidence, contending that the application for the warrants failed to establish probable cause and that several allegations in Till's affidavit were false. After an evidentiary hearing the district judge stated his belief that Till had mistakenly but not intentionally identified Danny Melohn as present on February 25, 1986 and that Till's affidavit had stated with undue certainty that he had seen Melohn. The district judge also found two errors in Till's reading of rap sheets: Potter was not, as Till's affidavit stated, a convicted felon; Howard had never been convicted of selling methamphetamine. The district judge characterized these errors as ones which "experienced officers ought not to make," but found that they had not been made "in reckless disregard of the truth; they were simply careless errors." The district judge concluded that as a matter of law, the agents were in good faith and, inadequate though the probable cause had been as to Joaquin Way, the agents were entitled to rely on the warrants. *United States v. Leon*, 104 S.Ct. 3405 (1985). He denied the motions to suppress. The defendants appealed.

ANALYSIS

Probable Cause

[1] There is no dispute that Magistrate Mix had probable cause to issue the warrant as to Loma Drive. She had the

sworn declaration of an agent experienced in the investigation of methamphetamine that he had reason to believe that the substance was being made and kept at the two locations to be searched. In support of this belief her affiant pointed to the fact that Christopher Howard had been seen buying the equipment, chemicals and ice necessary for its manufacture; that the power being used at Loma Drive suggested a lab was being run; and that a confidential informant reliable in the past had learned from a seller for Howard and Potter that these two men were actually now engaged in making methamphetamine.

[2] The defendants attack the warrant for Joaquin Way. We need not decide if Howard has standing to raise this objection. The defendants stress that there was no evidence of unusual power consumption at Joaquin Way and that as far as the agents knew Howard had only been there once. The defendants make light of the construction noises heard two evenings at Joaquin Way and the overheard reference to Chris as the one in charge. Once it is considered, however, that there was probable cause to believe that Howard was running a methamphetamine lab at Loma Drive, there was reason to believe that he was collaborating with Potter, as the informant had said; and there was reason to believe that the nocturnal activities at Joaquin Way of Potter and Howard were not innocent and that the construction going on was likely related to an extension or replacement of the lab believed to exist at Loma Drive.

As so often happens in these cases, the defendants isolate acts or circumstances which in themselves are innocent and refuse to admit the force that converging details have in creating probability. Precursors innocent in themselves appear in an entirely different light when they involve a man already believed with cause to be running a methamphetamine lab. The informant's information about Howard and Loma Drive had been circumstantially corroborated. Since Potter had not been seen at Loma Drive it was reasonable to conclude that

the manufacturing conspiracy, asserted by the informant to be going on with him, was taking place at the barn on Joaquin Way. Magistrate Mix did not need the kind of evidence necessary to convict anyone beyond a reasonable doubt. She was supposed to make a common sense, practical judgment. *Illinois v. Gates*, 462 U.S. 213, 236-237 (1983). She made that judgment. There was a "substantial basis" for her to believe evidence of wrongdoing would be found. *Massachusetts v. Upton*, 466 U.S. 727, 732, 733 (1984); *United States v. Michaelian*, 803 F.2d 1042, 1044 (9th Cir. 1986).

The Errors in the Affidavit

[3] As a matter of fact the district judge found the errors were not intentional. There was no clear error in these findings. Howard had been convicted of other crimes, although not of possessing methamphetamine for sale. Potter had been found guilty of an offense as a minor and, while not a felon, had a criminal arrest record. Till believed he had spotted Melohn on the premises. The mistakes, as a matter of law, were not made in reckless disregard of the truth. *Franks v. Delaware*, 438 U.S. 154 (1978). Moreover, while the mistakes undoubtedly were details increasing the probability that crime was afoot and contraband could be found, they were not crucial. Melohn's presence was a very minor corroboration of the informant. Potter's believed status as a felon was not the major fact suggesting he was now making methamphetamine. Howard's erroneously alleged conviction was not as significant as his recent arrest for possession of methamphetamine. All three mistakes can be corrected and probable cause remains.

AFFIRMED.

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NUMBER _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

ROBERT POTTER, CHRISTOPHER HOWARD, and MARY KAY LINDSTROTH,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF FILING AND SERVICE

JOHN R. DUREE, JR., Attorney for Petitioner ROBERT POTTER, certifies that pursuant to Rule 28 of this Court, he filed and served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit with the Clerk of this Court and on counsel for respondent, respectively, by depositing said petition, and copies thereof, in the United States Mail at Sacramento, California, on February 5, 1988, first class, postage prepaid within the time allowed for filing.

Service was made upon counsel for respondent at the following address: Solicitor General, Department of Justice, Washington, D.C. 20530. Personal service was made upon the United States Attorney, Eastern District of California, 650 Capitol Mall, Room 3305, Sacramento, California 95814.

All parties required to be served have been served. I certify under penalty of perjury that the foregoing is true and correct.

Executed on February 5, 1988.

JOHN R. DUREE, JR.
Attorney for Petitioner POTTER